

STATE OF CALIFORNIA

OFFICE OF ADMINISTRATIVE LAW

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In re:) 1998 OAL Determination No. 47
Request for Regulatory)
Determination filed by) [Docket No. 97-005]
BRIAN K. BARNETT)
regarding his placement) December 17, 1998
and retention by the)
DEPARTMENT OF) Determination Pursuant to
CORRECTIONS in) Government Code Section
administrative segregation) 11340.5; Title 1, California
pending the receipt of his) Code of Regulations,
file¹) Chapter 1, Article 3
)

Determination by: EDWARD G. HEIDIG, Director

HERBERT F. BOLZ, Supervising Attorney
CINDY PARKER, Administrative Law Judge
on Special Assignment
Regulatory Determinations Program

SYNOPSIS

The Office of Administrative Law ("OAL") was requested to determine whether the placement and retention of the requester in administrative segregation pending receipt of his central file by the Department of Corrections at California Medical Facility and California State Prison - Solano are "regulations," and therefore are without legal effect unless adopted in compliance with the Administrative Procedure Act ("APA").

OAL has concluded that the challenged actions are not "regulations."

ISSUE

The issue presented to the Office of Administrative Law ("OAL") is whether the Department of Corrections' ("Department") placement and retention of the requester in administrative segregation at the California Medical Facility and California State Prison - Solano pending receipt of his central file are "regulations" required to be adopted pursuant to the APA.²

BACKGROUND

From the time of their arrival in the prison system, and at regular intervals throughout the time of their confinement, prisoners are classified and reclassified in accordance with a classification system and procedure.³ The assigned classifications are influenced by a large number of factors, including, for example, term of commitment to prison, commitment offense, behavior in prison, and escape history. The classification process yields a numerical classification score which is used to assign prisoners to institutions which afford an appropriate level of security.

The Department's classification system implements Penal Code section 5068, last amended in 1989, which provides, in part:

"The Director of Corrections shall cause each person who is newly committed to a state prison to be examined and studied. This includes the investigation of all pertinent circumstances of the person's life such as the existence of any strong community and family ties, the maintenance of which may aid in the person's rehabilitation, and the antecedents of the violation of law because of which he or she has been committed to prison. Any person may be reexamined to determine whether existing orders and dispositions should be modified or continued in force.

"Upon the basis of the examination and study, the Director of Corrections shall classify prisoners and when reasonable, the director shall assign a prisoner to the institution of the appropriate security

level and gender population nearest the prisoner's home, unless other classification factors make such a placement unreasonable."

Within prisons there exists special housing for administrative segregation.⁴ Its purpose is clearly set forth in CCR, Title 15, section 3335, subsection (a) (last amended in 1988), which provides:

"When an inmate's presence in an institution's general inmate population presents *an immediate threat to the safety of the inmate or others, endangers institution security or jeopardizes the integrity of an investigation of an alleged serious misconduct or criminal activity*, the inmate shall be immediately removed from general population and be placed in administrative segregation." (Emphasis added.)

The remainder of section 3335 deals with temporary administrative segregation.

"(b) Temporary Segregation. Pending a classification committee determination of the inmate's housing assignment, which may include assignment to one of the segregation program units specified in section 3341.5 of these regulations or to the general inmate population, an inmate may be placed in a designated temporary housing unit under provisions of sections 3336-3341 of these regulations.

(c) An inmate's placement in temporary segregation shall be reviewed by the Institutional Classification Committee (ICC) within 10 days of receipt in the unit and under provisions of section 3338(a) of these regulations. Action shall be taken to retain the inmate in temporary segregation or release to general population. ICC shall review the inmate at least every 30 days thereafter until the inmate is removed from temporary segregation.

(1) ICC shall refer for Classification Staff Representative (CSR) review and approval any case in which an inmate is retained in temporary administrative segregation for more than 30 days. ICC shall recommend one of the following:

(A) Transfer to another facility.

(B) *Continue in temporary administrative segregation pending completion of an investigation or resolution of court proceedings.* ICC shall designate an anticipated length of time needed to complete the investigation or conclude court proceedings.”(Emphasis added.)

Release of a prisoner from administrative segregation is subject to the general standard identified in CCR, Title 15, section 3339, subsection (a), which provides:

“Release: Release from segregation status shall occur at the earliest possible time in keeping with the circumstances and reasons for the inmate’s initial placement in administrative segregation.”

CCR, Title 15, section 3341.5, identifies three types of segregated program housing units. They are (1) protective housing units, (2) psychiatric management units and (3) security housing units (“SHU”).

The requester was confined in a SHU during his administrative segregation. Section 3341.5, subsection (c)(3), provides:

“Release from SHU. An inmate shall not be retained in SHU beyond the expiration of a determinate term or beyond 11 months, unless the classification committee has determined before such time that continuance in the SHU is required for one of the following reasons:

“(A) The inmate has an unexpired MERD (minimum eligible release date) from SHU.

“(B) Release of the inmate would severely endanger the lives of inmates or staff, the security of the institution, or the integrity of an investigation into suspected criminal activity or serious misconduct.

“(C) The inmate has voluntarily requested continued retention in segregation.”

THIS REQUEST FOR DETERMINATION

Brian K. Barnett is an inmate who was temporarily transferred from the Reception Center Central, California Institution for Men ("RCC-CIM")⁵ to the California Medical Facility at Vacaville ("CMF") while attending Solano Superior Court proceedings in which he was a defendant. He was received at CMF on June 23, 1994, removed from CMF for the court proceedings on June 24, 1994 and returned to CMF on July 18, 1994. Soon after his return to CMF, he was advised that he would be placed in administrative segregation because his central file had not arrived at CMF.⁶

He appeared before the classification committee on July 22, 1994, which determined that he should remain in administrative segregation pending his return to RCC-CIM.⁷ The committee set his custody level at "Max A,"⁸ and he was placed on noncontact visitation. This placement was based upon the fact that his central file still had not arrived when he returned to CMF from the court proceedings; the fact that he was a defendant in the Solano county court proceedings, which continued after July; and the fact that he would not describe to the classification committee the nature of the court proceeding.

On September 2, 1994 the classification committee determined that the requester should be transferred to Solano for housing until his court proceedings were concluded.⁹ As of September 7, 1994 Mr. Barnett's central file had still not arrived, and he was placed in Administrative Segregation at Solano.¹⁰

I. IS THE APA GENERALLY APPLICABLE TO THE DEPARTMENT OF CORRECTIONS' QUASI-LEGISLATIVE ENACTMENTS?

Penal Code section 5058, subdivision (a), declares in part that:

"The director [of the Department of Corrections] may prescribe and amend rules and regulations for the administration of the prisons. . . . The rules and regulations *shall be promulgated and filed pursuant to [the APA]*. . . ." [Emphasis added.]

Clearly, the APA generally applies to the Department's quasi-legislative enactments.¹¹

II. DO THE CHALLENGED ACTIONS CONSTITUTE "REGULATIONS" WITHIN THE MEANING OF GOVERNMENT CODE SECTION 11342?

The key provision of Government Code section 11342, subdivision (g), defines “regulation” as:

“ . . . *every* rule, regulation, order, or standard of general application *or* the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by *any* state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure” [Emphasis added.]

Government Code section 11340.5, authorizing OAL to determine whether agency rules are “regulations,” and thus subject to APA adoption requirements, provides in part:

“(a) *No* state agency shall issue, utilize, enforce, or attempt to enforce *any* guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a [‘]regulation[‘] as defined in subdivision (g) of Section 11342, *unless* the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA].” [Emphasis added.]

In *Grier v. Kizer*,¹² the California Court of Appeal upheld OAL’s two-part test¹³ as to whether a challenged agency rule is a “regulation” as defined in the key provision of Government Code section 11342, subdivision (g):

First, is the challenged rule either:

- a rule or standard of general application, *or*
- a modification or supplement to such a rule?

Second, has the challenged rule been adopted by the agency to either:

- implement, interpret, or make specific the law enforced or administered by the agency, *or*
- govern the agency's procedure?

If an uncodified rule meets both parts of the two-part test, OAL must conclude that it is a "regulation" and subject to the APA. In applying the two-part test, OAL is mindful of the admonition of the *Grier* court:

"... because the Legislature adopted the APA to give interested persons the opportunity to provide input on proposed regulatory action (*Armistead, supra*, 22 Cal.3d at p. 204, 149 Cal.Rptr. 1, 583 P.2d 744), we are of the view that *any doubt as to the applicability of the APA's requirements should be resolved in favor of the APA.*" [Emphasis added.]¹⁴

A. DO THE CHALLENGED ACTIONS CONSTITUTE A "STANDARD OF GENERAL APPLICATION?"

The requester states the subject of his request as follows:

"... 'the confinement of a prisoner indefinitely in the security housing unit (SHU) or Administrative Segregation Unit (ASU) from the date of June 23, 1994 *to date* [November 18, 1994] on the claim I was received from the California Institution For Men Reception Center mainline with only a ("O.T.C." packet) out to court and return.¹⁵ Since the CDC file J-16224 was claimed to not have been received and such has been the basis for the continued retention in such housing."¹⁶

He describes the means by which he was placed and retained in administrative segregation as follows:

"A classification hearing has been scheduled repeatedly in which the body states 'We have not received your C.D.C. file so we elect to retain you in the Ad-Seg. Pending receipt of Central File, etc.' "¹⁷

The requester further states that a copy of “the rule” is not available, and *it is not*

“ . . . specifically set forth in the California Department of Corrections Operations Manual (i.e. Chapter 50000, Custody/Security Operations, Subchapter 52000, Custody Operations, Section 52080.27.2 Retention for Non-Disciplinary).”¹⁸

Section 52080.27.2 of the DOM provides as follows:

“When the reason for an inmate’s placement in administrative segregation is for non-disciplinary reasons, the classification committee hearing shall consider all available evidence or information relating to the validity of the reasons given for such placement as well as the need to retain the inmate in administrative segregation pending resolution of the situation or circumstances set forth in the administrative segregation order.”¹⁹

The requester is challenging a series of actions, some of which interpreted this DOM section as applied to his case. It is clear he is not challenging the provisions of the DOM section on its face, or as applied to inmates at one or more institutions. Although the requester uses the words “policy,” “practice,” and “rule” to refer to the challenged actions, he is actually challenging his, and only his, retention in administrative segregation. This is clear from his statement that “the rule” he is challenging is not in the DOM. Nor does he assert that other inmates at Solano or at other institutions are retained in administrative segregation pending receipt of their files.

Ordinarily, requests for determination challenge quasi-legislative enactments, rules which apply or could conceivably be applied to more than one person, and which are intended to apply to more than one person.

When a challenged rule applies to all members of a class, kind or order, it constitutes a standard of general application within the meaning of the APA.²⁰

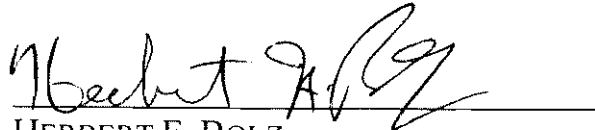
Here, the record before OAL does not establish that the challenged actions amount to rules because the requester does not allege that the actions apply or could be applied to other inmates. Moreover, the challenged actions are not standards of general application because there is no allegation or evidence that the challenged actions are applied generally.²¹

Having established that the challenged actions are not standards of general application, OAL does not reach the question of whether the challenged actions satisfy the second part of two-part "regulation" test. As the challenged actions are not "regulations," and therefore not subject to the APA, OAL need not consider whether any exemptions to the APA apply.

CONCLUSION

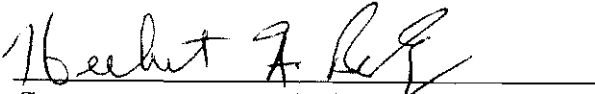
For the reasons set forth above, OAL concludes that the challenged actions are not "regulations."

DATE: December 17, 1998



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ENDNOTES

1. This Request for Determination was filed by Brian K. Barnett while incarcerated at California State Prison, Solano, J-6224, FC-5229, P.O. Box 4000, Vacaville, CA 95696-4000. He stated his release date would be August 22, 1997. The agency's response was submitted by Pamela L. Smith-Steward, Deputy Director of the Legal Affairs Division, Department of Corrections, 1515 "S" Street, North Building, P.O. Box 942883, Sacramento, CA 94283-0001 (916) 485-0495.
2. According to Government Code section 11370:

"Chapter 3.5 (commencing with Section 11340), Chapter 4 (commencing with Section 11370), Chapter 4.5 (commencing with Section 11400), and Chapter 5 (commencing with Section 11500) constitute, and may be cited as, the Administrative Procedure Act." [Emphasis added.]

OAL refers to the portion of the APA which concerns rulemaking by state agencies: Chapter 3.5 of Part 1 ("Administrative Regulations and Rulemaking") of Division 3 of Title 2 of the Government Code, sections 11340 through 11359.
3. See CCR, Title 15, sections 3375 -3379.
4. See CCR, Title 15, sections 3335 - 3345.
5. The California Institution for Men is located three miles south of the City of Chino and consists of four separate facilities, including reception centers. The reception centers receive and process newly committed male felons from the southern counties. Department of Corrections Operations Manual, section 62110.6.
6. CDC Form 114D signed by Lt. Pappa, date illegible.
7. Exhibit "E" to the Request for Determination, dated July 22, 1994.
8. Inmates assigned a "Maximum A" custody designation shall be housed ". . . in single cells (when possible) in security housing or in an approved specialized housing unit." CCR, Title 15, section 3377.1, subsection (A)(1).
9. Exhibit "D" to the Request for Determination, dated September 2, 1994.
10. Exhibit "A" to the Request for Determination, CDC Form 114D dated September 7, 1994.
11. The APA would apply to the Department's rulemaking even if Penal Code section 5058 did not expressly so provide. The APA applies generally to state agencies, as defined in Government Code section 11000, in the executive branch of Government, as

prescribed in Government Code section 11342, subdivision (a).

12. (1990) 219 Cal.App.3d 422, 440, 268 Cal.Rptr. 244, 251. OAL notes that a 1996 California Supreme Court case stated that it “disapproved” of *Grier* in part. *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 577, 59 Cal.Rptr. 2d 186, 198. *Grier*, however, is still good law, except as specified by the *Tidewater* court. Courts may cite on a particular point, cases which have been disapproved on other grounds. For instance, in *Doe v. Wilson* (1997) 57 Cal.App.4th 296, 67 Cal.Rptr. 2d 187, 197, the California Court of Appeal, First District, Division 5 cited *Poschman v. Dumke* (1973) 31 Cal.App.3d 932, 107 Cal.Rptr. 596, on one point, even though *Poschman* had been expressly disapproved on another point nineteen years earlier by the California Supreme Court in *Armistead v. State Personnel Board* (1978) 22 Cal.3d 200, 204 n. 3, 149 Cal.Rptr. 1, 3 n. 3. Similarly, in *Economic Empowerment Foundation v. Quackenbush* (1997) 57 Cal.App.4th 677, 67 Cal.Rptr.2d 323, 332, the California Court of Appeal, First District, Division 4, nine months after *Tidewater*, cited *Grier v. Kizer* as a distinguishable case on the issue of the futility exception to the exhaustion of administrative remedies requirement.

Tidewater itself, in discussing which agency rules are subject to the APA, referred to “the two-part test of the Office of Administrative Law,” citing *Union of American Physicians & Dentists v. Kizer* (1990) 223 Cal.App.3d 490, 497, 272 Cal.Rptr. 886, a case which quotes the test from *Grier v. Kizer*.

13. The *Grier* Court stated:

“The OAL’s analysis set forth a two-part test: ‘First, is the informal rule either a rule or standard of general application or a modification or supplement to such a rule? [Para.] Second, does the informal rule either implement, interpret, or make specific the law enforced by the agency or govern the agency’s procedure?’ (1987 OAL Determination No. 10, *supra*, slip op’n., at p. 8.)

OAL’s wording of the two-part test, drawn from Government Code section 11342, has been modified slightly over the years. The cited OAL opinion - **1987 OAL Determination No. 10** - was published after *Grier*, in California Regulatory Notice Register 98, No. 8-Z, February 23, 1996, p. 292.

14. (1990) 219 Cal.App.3d 422, 438, 268 Cal.Rptr. 244, 253.
15. According to the Department, the fact that the requester’s central file was not received by CMF or Solano was only one of the reasons he was placed in administrative segregation. The other two reasons were that he was a defendant in ongoing Solano Superior Court proceedings and that he would not describe the nature of the proceedings to the classification committee.
16. Request for Determination, pp. 1,2.

17. Request for Determination, p.2.
18. Request for Determination, pp.1,2.
19. While section 52080.27.2 was contained in the DOM as of the November 18, 1994 Request for Determination, Administrative Bulletin 94/17 of the Department of Corrections, issued on November 29, 1994, instructed Correctional staff not to use section 52080 [or its subsections] but to use "local rules" instead until section 52080 could be processed pursuant to the APA. OAL does not have jurisdiction to decide the issue of whether the Department correctly applied section 52080 to the requester's individual case.
20. *Roth v. Department of Veteran Affairs* (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552. See *Faulkner v. California Toll Bridge Authority* (1953) 40 Cal.2d 317, 323-324 (standard of general application applies to all members of any open class).
21. This determination does not preclude the possibility that the Department has a rule that inmates be placed in administrative segregation until their central files are received. It merely concludes that, based upon the record before us, the existence of such a rule has not been alleged or established.